Firehouse Lawyer

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Joseph F. Quinn, Editor

Joseph F. Quinn is legal counsel to more than 35 fire districts and regional fire authorities in Pierce, King and other counties throughout the State of Washington.

His office is located at:
10222 Bujacich Rd. NW
Gig Harbor, WA 98332
(in Gig Harbor Fire Dept's Station 50)

Mailing Address:
P.O.Box 65490
University Place, WA 98464

Telephone: **253.858.3226**

Fax: **253.858.3221**

Email Joe at:
firelaw@comcast.net

Access this newsletter at:
www.Firehouselawyer.com

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Charges for Medical Records Copies Increased

At WSR 09-13-102, filed June 17, 2009 and effective July 1, 2009, WAC 246-08-400 has been amended. This means that medical providers such as fire districts can increase their charges for copying, searching, or duplicating medical records. Now allowable copying charges are $1.02 per page for the first thirty pages copied, and $0.78 per page thereafter. (It was $0.96 and $0.73 before, respectively.). A $23.00 clerical fee may also be charged for searching and handling records. (It was $22.00 before July 1, 2009.) This amended WAC is effective through June 30, 2011.

CHARGING FOR OTHER RECORDS – THE PUBLIC RECORDS ACT

Obviously, such charges do not apply generally to copying open public records. Charging for that service is governed by the Public Records Act. RCW 42.56.070(7) allows agencies to charge only the actual cost of providing the records. For photocopies, the default rate is 15 cents per page. RCW 42.56.070(8). An agency can only charge more than that if they explain the higher rate in a formal statement that must be available for public inspection and copying. RCW 42.56.070(7)(a). If an agency were to pursue actual costs, that "formal statement" could include costs of photocopying and all costs directly incident to shipping or mailing the records, such as postage or delivery charges, the cost of envelopes or containers, and staff time to copy and mail. Such costs should **not** include staff salaries, benefits, or other general administrative or overhead costs, but only those costs directly related to the actual costs of copying or mailing. RCW 42.56.070(7)(b). Most of my clients generally charge the default rate of 15 cents per page, probably because they found it more difficult to demonstrate a greater amount is needed. Some clients even give away the first ten pages or so, free of charge, to avoid the nuisance of dealing with small amounts of cash. I am certain that this practice would not be a prohibited "gift of public funds".

MEDICARE-ONLY DIVIDED REFERENDUM NOW AVAILABLE TO CERTAIN PUBLIC EMPLOYEES

Public employers in Washington may not be aware of the legislation passed in 2008, but which is now just being implemented in this State. Those employees hired after 1977 but prior to April 1, 1986 have heretofore not been eligible to take part in the Medicare system, by which many public and private employees become eligible for certain health coverage at age 65. Including Washington State local government employees in Medicare did not become mandatory until 1986. And employees eligible for LEOFF 1, for example, due to their hiring prior to October 1977, were in a different category as well.

Until the 2008 amendments to RCW 41.48.030, effected by Chapter 142, Laws of 2008 (HB 2510), it would have taken a referendum of all employees to opt into Medicare, so obviously those employees not hired during the above "window" of dates would have little motivation to vote affirmatively. Therefore, that change could not realistically happen, and so the anomaly remained that those employees hired during that eight-year period were excluded from Medicare coverage. We believe there are hundreds, nay perhaps thousands, of employees in this category. This legislation (the original version of the bill was drafted by this writer) changed all that. However, the Employment Security Department was charged with the duty of implementing the legislation and that work took some time. Now the duties of the State Social Security Administrator have been moved to the Department of Retirement Systems.

If the public employer is willing to extend to employees this right to hold a referendum, to achieve pay/benefits equity with their peers at work, it should work like this: First, the governing body adopts a resolution to initiate the referendum process. The resolution requests authorization to divide the retirement systems by holding the divided referendum (allowing affirmative votes to 'opt in' to Part A Hospital Insurance). It authorizes the appropriate individual to execute an agreement, such as the Fire Chief. It establishes the effective date of coverage, and acknowledges the applicability of state and federal laws relating to withholding, employer contributions and record keeping. You can obtain a sample resolution now from DRS.

The local government then submits the adopted resolution and a Section 218 coverage questionnaire to the State Social Security Administrator, including a suggested date for the referendum (vote). The DRS will take it from there. There must be no less than 90 days after the Notice of Referendum to the referendum date, to allow people to educate themselves about the issues, or to enable a fully informed vote. The employer must create a list of employees and then cooperate with the Social Security Administration and the State Social Security Administrator in conducting workshops during the 90-day notice period for the education of "voters".

As most people know, of course, one has to accumulate 40 quarters of covered service in order to qualify for Medicare. The Employment Security Department or DRS have developed good explanatory materials and FAQs to provide to employees considering opting in. Anyone interested in the subject of this article can obtain information from DRS and the State Social Security Administrator, which has the sample resolutions and other forms. Or call…the Firehouse Lawyer.

LOUDERMILL… WEINGARTEN… GARRITY… WHO ARE THESE PEOPLE?

Sometimes I think it is helpful to review fundamental principles. Well, for me, it is a review but many of my readers hear these terms bandied about, and they may really not know what they all mean! For those readers, consider this a "primer". In other words, the point of this article is not to delve into lawyerly depth, or all the nuances of what the legal requirements of these human resources concepts are in a complex case, but rather just to outline the basic concepts.

What is a Loudermill hearing or conference? Here is the concept. The U.S. Supreme Court has held that an employee who has a contractual right, or a statutory right, to retain their employment position, absent good cause for termination, owns in effect **a property right.** And as you all no doubt remember from your Constitutional Law class, no person may be deprived of a property right without having been given **due process of law.** All right. Let's say your employee, who you either want to terminate or give a long-term (30 days or more) suspension, either is covered by cause provisions in a union contract or in a professional services contract. Or suppose they fall under a civil service statute. In these instances, the Supreme Court case of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 84 L.Ed. 2d 494, 105 S.Ct. 1487 (1985), requires that you provide them with due process, which in this context means you owe them reasonable notice of the charges, followed by a hearing or informal conference in which the evidence supporting the charges will be explained, and then the person gets the opportunity to respond to the charges. The Loudermill concept does **not** mean necessarily that the accused gets to call witnesses, or cross-examine witnesses of the employer. Indeed the cases do not even require the employer to call witnesses, as it is not a trial or hearing, but an informal conference prior to termination or severe discipline.

What about the "Weingarten rule", sometimes referred to in these pages? At least with union-represented personnel, this NLRB case stands for the concept that, when the employer requires the employee to participate in an **investigatory interview**, which could result in discipline, then the employee must be afforded the opportunity of having their union representative present. Of course, they can waive that right, but since sometimes people forget or change their minds about whether that was a good idea, I recommend the employer insist the union rep or shop steward be invited to such interviews. Believe me, that insistence can avoid problems later.

Finally, what are "Garrity rights"? This term comes from the case of *Garrity v. New Jersey,* 385 U.S. 493, 17 L.Ed. 2d 562, 87 S.Ct.616 (1967), which involved a police officer charged with misconduct, which, if proved, may have been a criminal matter. Based on the Vth Amendment, which is part of the federal Bill of Rights, and which protects each of us from self-incrimination, the Court in *Garrity* laid down some rules requiring how to handle such issues. In the workplace, public employees cannot be compelled to answer questions, the answers to which might place them in criminal jeopardy. I recommend that employers feel free to give the assurance to employees who you might want to question that no criminal charges will arise from their statements. It is permissible to order employees to give statements, under threat of discipline for insubordination if they refuse, but those statements may not be used in any criminal prosecution of that same person.

WHEN IS A REQUEST FOR INFORMATION ACTUALLY A PUBLIC RECORDS REQUEST?

Division I of the Court of Appeals in Seattle recently decided a case that sheds light on a question my clients often ask: "Is a request for information the same thing as a public records request?" In *Beal v. City of Seattle,* 2009-WA-0623.1544, Cause No. 62171-8-I, certain citizens met with some City of Seattle officials to discuss the City's plans to mitigate environmental impacts of construction of the planned Joint Training Facility for police and fire, slated to be built in the White Center area. The citizens basically claimed in the litigation that the City did not respond within five business days to an oral public records request. The City maintained that, while the citizens asked at the meeting for some information, the City officials did not understand that to be a records request. The trial court granted summary judgment in favor of the City, holding that the citizens did not request public records at the meeting. In this reported decision, the Court of Appeals affirmed that decision, and in the process we feel the court did clarify the duties of agencies when faced with oral requests for information, as opposed to oral requests for records.

Under the prompt response provision of the PRA, an agency must respond to a request for public records within five business days of receipt of the request by either (1) providing the record(s); (2) acknowledging that the agency has received the request and providing a reasonable estimate of the time the agency needs to respond; or (3) denying the request (and citing the statutory reasons for denial). However, the prompt response requirement does not apply until a requestor makes a specific request for identifiable public records. This is why I routinely advise agencies to ask for clarification if they are not sure (1) whether a person has made a PRA request for records as opposed to just asking questions or seeking information or (2) what records a requestor is asking for in the first instance. But what is an "identifiable public record"?

An identifiable public record is one for which the requestor has given a reasonable description enabling the government employee to locate the requested record. See *Wood v. Lowe,* 101 Wn. App. 872, 878, 10 P.3d 494 (2000). Although requestors are not required to cite to the PRA itself, they must state their request with sufficient clarity to give the agency fair notice that it has received a request for a public record! See *Wood.*

In the *Wood* case, the court reviewed a situation in which the employee and requestor had asked for her personnel file. The court said the personnel file, while identifiable, was not a public record (this conclusion may be debatable) and also noted that another statute requires employers to provide employees access to their own personnel file. In another case the *Beal* court relied upon, *Bonamy v. City of Seattle,* 92 Wn. App. 403, 960 P.2d 447 (1998), the employee/requestor sent an e-mail asking about the extent to which employees had access to internal complaints filed against them. That e-mail was followed with a question about the policy guidelines governing internal investigations. In that case, summary judgment was granted to the city, and the Court of Appeals determined the City did not violate the PRA because it only received a request for information, not a request for a public record.

Relying on *Wood* and *Bonamy,* the Court of Appeals (as you may have guessed by now) ruled that, while the PRA does not require records requests to be in writing, a request must be recognizable as a request for records, and not just a vague question or request for information. The message to requestors is to make their records requests unambiguous; the best practice is to put it in writing. In the meantime, however, we will continue to advise agencies to ask for clarification when in doubt. Partly, my reasoning for this cautious approach is based on cases like the next one.

SUPREME COURT CLARIFIES THE PENALTIES FOR BAD FAITH IN RESPONDING TO PUBLIC RECORDS REQUESTS

Reading the *Beal* case, decided on June 22, 2009, reminded me that I wanted to discuss in these pages *Yousoufian v. Office of Ron Sims,* 2009-WA-0119.415, Cause No. 80081-2. Although this case was decided in January 2009, I am finally getting around to writing about it. I would urge my clients to be much more timely than that, as this case may be very important. Rather than summarize the voluminous facts of the case, let me just say that Armen Yousoufian requested records pertaining to the county's involvement in a $300 million bond issue for a new football stadium in Seattle, by submitting a PRA request on May 30, 1997. On April 20, 2001 Yousoufian finally received all the studies and cost data he originally requested! (This is a bit less than four years, but considerably more than five business days.)

The unchallenged findings of fact entered by the trial court show that King County repeatedly deceived and misinformed Yousoufian for years. The county told him it produced all the requested documents when in fact it had not. It told him archives had been searched and records filed, when in fact they were not. It told him the information was located elsewhere, when in fact it was not. Justice Sanders,

for the Supreme Court, described "years of delay, misrepresentation, and ineptitude on the part of King County." The first trial judge described the county's actions as "negligent in the way it responded…at every step of the way, and this negligence amounted to a lack of good faith." The trial court also noted that King County did not adequately train its employees in handling PRA requests and there was a total lack of coordination.

As for the penalty for this undeniable violation and lack of good faith, that is the main point of this case. The first trial judge assessed a penalty at $5 per day, the lowest possible penalty, as the PRA provides for a range of $5 at the bottom of the range, to $100 per day, at the top of the range. The Court of Appeals, in what is called Yousoufian I, held the trial court abused its discretion by setting the penalty so low, saying there was "gross negligence". In Yousoufian II, the Supreme Court agreed in 2005, and remanded to the trial court to impose an appropriately higher penalty. On remand, the trial court imposed a penalty of $15 per day, which amounted to a penalty of $123,780 (which seems to be real money to this humble commentator, even if the agency is King County). Mr. Yousoufian again appealed and the Court of Appeals again reversed, proposing that the penalty scale should be "tiered" based on the degrees of culpability found in Washington Pattern Jury Instructions. The county petitioned for discretionary review and the Supreme Court granted that review. It did not adopt the tiered approach.

Justice Sanders' opinion was joined by three other Supreme Court justices, but Justice Chambers also concurred, as did Chief Justice Alexander, at least in part. Justice Owens was alone in dissent, apparently because of a perception that the new rule interferes with the trial courts' discretionary powers to base penalties on the facts they find to be true.

The basic upshot of the ruling is this: The Supreme Court has provided guidance to trial courts faced with the need for assessing penalties for agency violations of the Public Records Act. Suffice it to say that the days of a "slap on the wrist" for agencies are over. At least this will be true for lengthy, intentional, or grossly negligent violations.

The essence of the Court's decision is that the justices have provided the following factors, which may overlap and are not meant to be an exclusive or exhaustive list, that may serve to **mitigate** the penalty: (1) lack of clarity of the PRA request; (2) a prompt response or legitimate follow-up inquiry for clarification [remember what I said above about requesting clarification]; (3) good faith, honest, timely, and strict compliance with the PRA procedural requirements and exceptions; (4) **proper training and supervision of personnel [who process records requests]**; (5) reasonableness of any explanation for noncompliance; (6) helpfulness of the agency to the requestor; and (7) existence of systems to track and retrieve records (emphasis added).

The Court also listed some aggravating factors that might be used by the trial court judge to guide discretion in fixing the penalty, including: (1) delayed response, especially when time is of the essence; (2) lack of strict compliance with the PRA procedural requirements and exceptions; (3) lack of **proper training and supervision of personnel and response;** (4) unreasonableness of any explanation for noncompliance; (5) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA; (6) dishonesty; (7) potential for public harm, including economic loss or loss of governmental accountability; (8) personal economic loss; (9) a penalty amount necessary to deter future misconduct considering the size of the agency and the facts of the case (emphasis added).

The foregoing, it seems to this writer, could be helpful guidance to the trial court in assessing whether the penalty should be at or near the low end of the range ($5 per day) or closer to the high end of the range ($100 per day). Unfortunately, some of the justices went a bit farther and expressed their opinions about where the penalty should fall in that case, leading to comments in the dissent and the concurrence regarding the role of appellate judges as compared to trial judges in applying the law to the facts of a case.

The lesson to be learned by local government agencies, I think, is that they need to be more careful to always act in good faith with these PRA requests. Treating all requestors fairly, even if we may think they are a pain in a certain part of the anatomy, is absolutely essential in these cases. Responding promptly (within five business days) is a must, even if the response basically tells the requestor how long it may take to produce records. Asking for clarification is also a good practice, if the request is ambiguous or confusing. We think the result in *Yousoufian III* is actually a good one, because it strips agencies of the delusion that the penalty will never be that large for such records violations, no matter how negligent they are.

DISCLAIMER